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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 EDISON CABALUNA,

12 Plaintiff,

13 vs.

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15 WAL-MART STORES, INC.,

16 Defendant.

CASE NO. 11cv1190-MMA (WMC)

**ORDER DENYING AS MOOT
DEFENDANT'S MOTION TO
DISMISS**

[Doc. No. 5]

17 On March 24, 2011, Plaintiff Edison Cabaluna commenced an action in the Superior Court of
18 the State of California, County of San Diego, alleging Defendant Wal-Mart Stores, Inc.
19 discriminated against him on the basis of his national origin and disability. *See* Doc. No. 1. On May
20 31, 2011, Defendant removed the action to this Court and thereafter filed a motion to dismiss
21 Plaintiff's complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6). *See* Doc. Nos.
22 1-5. On June 22, 2011, Plaintiff timely filed a First Amended Complaint.¹ *See* Doc. No. 6.

23 The complaint which Defendant moves to dismiss is no longer the operative pleading in this
24 action. An amended complaint supercedes the original complaint. *Forsyth v. Humana, Inc.*, 114
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26 ¹ Under Rule 15(a), "[a] party may amend the party's pleading once as a matter of course at any
27 time before a responsive pleading is served." Defendant did not file an answer, and instead filed a
28 motion to dismiss. A motion to dismiss is not a "responsive pleading" within the meaning of Rule 15,
accordingly Plaintiff did not need leave of court to amend his complaint once as a matter of right within
21 days of being served with the motion to dismiss. *See Tahoe-Sierra Preservation Council, Inc. v.*
Tahoe Regional Planning Agency, 216 F.3d 764, 788 (9th Cir. 2000); Fed. R. Civ. P. 15(a)(1)(B).

1 F.3d 1467, 1474 (9th Cir. 1997); *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Once a plaintiff
2 files an amended complaint, the original pleading no longer serves any function in the case.
3 Because Defendant's pending motion seeks dismissal of a complaint that is no longer the operative
4 pleading in this case, the motion has become moot.

5 Accordingly, the Court **DENIES AS MOOT** Defendant Wal-Mart Stores, Inc.'s motion to
6 dismiss.

7 **IT IS SO ORDERED.**

8 DATED: June 24, 2011

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10 Hon. Michael M. Anello
11 United States District Judge
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